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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of Rules and
Policies Governing Pole
Attachments

CS Docket No. 97-98

REPLY COMMENTS OF
THE EDISON ELECTRIC INSTITUTE
AND
UTC, THE TELECOMMUNICATIONS ASSOCIATION

Dated: August 11, 1997

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SUMMARY

Pursuant to the intent of the Telecommunications Act of 1996, pole owners must be free to negotiate reasonable rates, terms, and conditions - on an individual basis - with all attaching telecommunications providers, without fear that such providers will be able to "cherry-pick" from different contracts. Every additional cable overlashment has an impact on poles at least as great as additional attachment, and so must be subject to a full attachment fee. Regulatorily established attachment rates based on distribution poles are completely inappropriate for application to ducts and conduit, as well as to rights-of-way, transmission facilities, or wireless attachments.

In fact, transmission facilities, rights-of-way, and wireless facilities are beyond the scope of this proceeding as noticed by the Commission. Further, under the Telecommunications Act, any limitation on rates for attachments to utility poles by incumbent local exchange carriers is beyond the scope of the Commission's authority altogether.

All attaching entities benefit from the use of poles in their entirety - so all attaching entities must share in **all** of the costs of providing those benefits. This includes such costs as those of space rendered "nonusable" because of NESC and other safety requirements. The specific costs differ from one utility to another, making a formula next to useless. Individual utilities should be free to demonstrate the costs (such as the height of poles) applicable under their own circumstances. If a formula is used, however, the amount of space traditionally viewed as "useable" must be reduced. Costs which benefit all pole occupants also include grounding equipment and lightening arrestors.

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INTRODUCTION

Pursuant to Section 1.415 of the Commission's Rules, the Edison Electric Institute ("EEI") and UTC, the Telecommunications Association ("UTC")¹ respectfully submit the following Reply Comments on the Commission's Notice of Proposed Rulemaking herein, released March 14, 1997, seeking comment on proposed modifications to the Commission's rules relating to the rates utilities may charge for attachments to utility poles, ducts, conduits, or rights-of-way, generically referred to as "pole attachments" (62 Fed. Reg. 18,074 [Mon., Apr. 14, 1997]; see 62

1 UTC the Telecommunications Association, was formerly known as the Utilities Telecommunications Council.

Fed. Reg. 26,465 [Wed., May 14, 1997]; __ Fed. Reg. __, __ [__, July __, 1997] [extension of filing date for Reply Comments to August 11, 1997]). EEI and UTC are pleased to offer the following responses to various initial comments on the Commission's proposal filed on July 27, 1997.

DISCUSSION

PREFACE

The purpose of the Telecommunications Act of 1996 is to foster competition in the provision of new or expanded telecommunications services. It was not the intent of Congress to hobble the market by subsidizing some telecommunications providers and their customers at the expense of any other segment of service providers and their customers. To meet the goals of Congress, expressed in the responsibilities it placed upon the Commission, pole attachment rates should reflect - match - the market rate as closely as possible. This will ensure that new infrastructure is built as needed, and costs imposed on all infrastructure are fully recovered. To the extent that rates cannot be agreed upon, any regulatory rate imposed by the Commission should be based on forward-looking costs, for the same reasons.

PRIMARY ISSUES**The FCC must Recognize and Enforce the Validity of Individually Negotiated Contracts Without Regard to Other Attachment Agreements**

A number of commenters agree with EEI and UTC that the FCC should expressly affirm that pole owners and attaching telecommunications providers are free to negotiate reasonable terms and conditions of attachment. (The Electric Utilities Coalition ["Electric Coalition" or "EC"] at 22-24, GTE Service Corp. ["GTE"] at 1-3 & 65, BellSouth Corp. at 3, United States Telephone Assoc. ["USTA"] at 2, US West at 7; see group of "Electric Utilities"² ["Utilities Group" or "UG"] at 22-26; see also Tele-Communications, Inc. ["TCI"] at 24, endorsing cost-sharing agreements.) The underlying intent of the pole attachment provisions of the Telecommunications Act of 1996 ("the Act") is that parties should negotiate reasonable rates, terms and conditions of attachment and that the Commission should not involve itself unless engaged by one of the parties to review a particular negotiated term or condition. USTA (at 2) echoes the comments of EEI and UTC that the most efficient manner for determining just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements that reflect the market (see UG at 33, SBC Communications Inc. ["SBC"] at 23-24).

2 American Electric Power Service Corp., Commonwealth Edison Co., Duke Power Co., Florida Power & Light Co, and Northern States Power Co.

EEI and UTC join the Electric Coalition in urging the FCC to expressly recognize that the Act's non-discriminatory access provision does not require that the rates, terms and conditions of pole attachment agreements between a utility and various attaching entities be identical. Congress intended FCC intervention and reliance upon the statutory formula only where negotiating parties are unable to mutually reach agreement upon rates, terms and conditions. This necessarily requires some differentiation in the terms and conditions of agreements, depending on what the parties specifically negotiate. For this reason, the FCC should reject WorldCom Inc.'s suggestion (at 7) that the FCC adopt a "most favored nation" treatment that would require that there be no variance between pole attachment agreements. As the Electric Coalition correctly observes (at 22-23), if reasonable negotiated terms and conditions are not respected (and enforced) by the FCC, the negotiation process will become a sham. Utilities and attaching entities will have little incentive to negotiate if the fruits of their efforts can be rendered nugatory by resort to a tariff-like formula established and rigidly implemented by Commission rules. *Id.*

In this regard, the Commission's decision should be informed by the Eighth Circuit's recent decision in *Iowa Utilities Board v. FCC.*, No. 96-3321, *et al*, in which the court struck down an FCC interpretation of an analogous non-discrimination provision. In *Iowa Utilities* the court held that it was not reasonable for the FCC to allow requesting carriers to "pick and choose" from among the most favorable terms of other interconnection

agreements entered into by the local exchange carrier ("LEC") without being required to accept the other terms of those agreements in their entirety. Specifically, the court indicated that even though Section 252(i) requires a LEC to make any interconnection, service or network element available to any party on the same terms and conditions as the LEC provides to others, the FCC's interpretation of Section 252(i) conflicted with "the Act's design to promote negotiated binding agreements." The court concluded that the pick-and-choose rule could thwart the negotiation process because the LEC would be reluctant to make concessions on one term in exchange for the benefit of another term if it then faced the prospect of having to offer the same concession to another carrier without receiving any corresponding benefit.

As in the *Iowa Utilities* case, the FCC must recognize and allow for a range of acceptable rates a utility may charge for the pole attachments depending on the specific terms and conditions that the parties freely negotiate. As BellSouth indicates, if a pole owner and attacher are able to reach an agreement on pole attachment rates, the Act requires that the FCC accede to the attacher's judgment that the rates are, in fact, just and reasonable -- without regard to the terms and conditions of other pole attachment agreements.

Overlashed Cables Should Be Subject to a Separate Attachment Fee

EEI and UTC are in complete agreement with the Utilities Group that overlashed cable should be subject to a separate attachment fee. As the Utilities Group points out (at 73), the increased diameter of the cables strung on the pole causes an increase in the resistance that the overlashed cables will have to wind, and will increase the surface on which ice (and rain) can accumulate. The overlashing party should be required to pay the full attachment rate to the utility because the overlashing party takes up load capacity on the pole equal to or greater than a regular attachment. It must also be noted that, precisely because overlashing places additional strain on a pole, its existence easily could require a subsequent attacher or the utility to replace the pole earlier than would otherwise be necessary absent the overlashing, just as would an additional separate attachment.

An assessment of an additional fee for overlashing is also consistent with the FCC's own previous determination in its *First Report and Order* (CC Docket No. 96-98) implementing the Act's right-of-way access provisions. There, the Commission noted that utilities are compelled to allow a party to maximize useable capacity by permitting overlashing, rather than requiring the placement of a larger pole (with its attendant increase in costs) in order to accommodate a new attachment. Since overlashing is an alternative to putting in a larger pole to accommodate an

additional separate attachment, clearly the overlashment itself must be treated as a separate attachment.

As an alternative to a separate pole attachment charge for each overlashment, EEI and UTC could support imposition of a proportionate "common space" charge for overlashments. A common space charge would recognize that, while the overlashed cable may not, in all circumstances, occupy more than one foot of useable space (although they often do), it still puts a greater strain on the loading of the entire pole and still benefits (as does any attachment) from all of the common space on the pole. Such an approach would be consistent with the Act's recognition (under the new formula) that the common, non-useable space is of equal value to all attaching parties. As well, the New York Public Service Commission adopted a similar approach for allocating the costs of overlashing.

Finally, separate from the consideration of pole attachment fees, overlashments result in additional safety and engineering concerns. Despite these valid concerns, utilities increasingly are reporting that cable companies are overlashing (and making other attachments) without any prior notice to the utility (see EC at 60). Therefore, and at a minimum, the FCC must require that an overlashing entity consult with the utility prior to the overlashing, to ensure that the additional cable will not exceed the load capacity of the poles. The FCC also must make clear that the overlashing entity must be responsible for any make-ready or engineering involved in accommodating the overlashing, including

upgrades to anchors and inspection costs, just as would any attaching entity.

Transmission Towers and "Wireless" Attachments Are Outside the Scope of this Proceeding

A number of parties agree with EEI and UTC that, until the FCC resolves the outstanding petitions in its interconnection proceeding dealing with transmission facilities and wireless attachments, the FCC should limit the scope of this proceeding to utility distribution poles and conduit. (See UG at 7-8, Public Service New Mexico at 4-5.) As noted by EEI and UTC in their comments, the pole attachment provisions are aimed at facilitating competition in local distribution services. Therefore, they do not encompass transmission facilities, which in any event are normally located outside of distribution areas. The fact that utilities and LECs historically have not entered into joint-use agreements regarding transmission facilities supports this fact. Moreover, the exclusion of railroads from the definition of utility is largely premised on the fact that railroads, while considered utilities for certain purposes, contain rights-of-way that are not the type of facilities necessary for increased competition in local cable or telephone service.

The outrageous suggestion of the Association for Local Telecommunications Services ("ALTS" at 4) that utilities should not be able to charge attachment rates to transmission facilities that exceed rates that would be applicable under the FCC's

formula for distribution poles illustrates the need for the FCC to divorce these two issues. The proposed interim formula is based on distribution poles and does not in any way attempt to account for the far greater costs associated with transmission towers, as well as any attachments to them. The application to transmission facilities of even a properly crafted formula based on distribution facilities would provide grossly inadequate cost-recovery, and clearly would amount to an uncompensated confiscation of utility property. Contrary to the request of MCI Telecommunications Corp. ("MCI" at 22), such an inequity would not be appropriate even for an interim period. As the New York Public Service Commission recently determined, access to transmission towers is best left to market-based, private negotiations.

**Application of the Act to Incumbent LEC Attachments Is
Beyond the Scope of the FCC's Authority**

USTA requests that the FCC act to ensure that the rates charged by electric utilities for attachments by incumbent LECs ("ILECs") are consistent with the regulated rates imposed by Section 224 for non-LEC cable and telecommunications pole attachments. In support of their request, USTA cites (at 11-13) instances where the median attachment rate paid by an ILEC to an electric utility is greater than the median of what the ILEC charges non-utility telecommunications service providers.

USTA's recommendation should be rejected as outside the scope of the FCC's authority under the Act, and unwarranted as a

matter of public policy. Section 224(a)(5) of the Pole Attachment Act as amended by the Telecommunications Act of 1996 makes clear that ILECs are not entitled to Federally regulated rates for their attachments to utility facilities. As a consequence, their pole attachment agreements are wholly outside of the FCC's authority to regulate pole attachment rates. In adding Section 224(a)(5), Congress specifically evidenced its intent that the broadening of the pole attachment legislation beyond cable attachments to include telecommunications attachments was not meant to encompass attachments by ILECS.

The decision to exclude ILEC attachments from the application of the pole attachment regulations is in recognition of the fact that electric utilities and ILECS have long had comparable bargaining power and amicable relationships. Historically, electric utilities and local telephone companies have negotiated mutually beneficial pole arrangements, typically in the form of joint-use or joint-ownership agreements. Under these arrangements, utilities and telephone companies both often have ownership rights in the poles that obviate the need for any form of regulated attachment rate. In many other situations, utilities and ILECS have reciprocal agreements to attach to each other's poles. These agreements also provide mutual benefits that demonstrate there is no need for regulation, as Congress recognized (see UG at 26).

The rates that USTA cites as evidence of overreaching by the electric utilities in fact demonstrate just the opposite. They represent the true, fully-allocated costs of pole ownership, as

opposed to the subsidized, artificially low rates heretofore available to cable-television providers. Moreover, the USTA figures are misleading in that they omit a vital complimentary statistic: the median rate charged by ILECs to electric utilities for electrical attachments to ILEC poles. In almost all cases, the attachment rate paid to ILECs by electric utilities is equal to or exceeds the rates charged by electric utilities to ILECS.

EEI and UTC do not have a quarrel with those rates, however, as they reflect agreement between mutual beneficiaries about the true cost of providing attachments. In fact, under a full allocation of all pole costs among all attaching entities, utilities would be likely to be charged a proportionately higher rate, since they typically occupy a larger percentage of the pole. However, if the ILECS were able to obtain the mandated pole attachment rate for cable services, electric customers would subsidize ILEC costs, in addition to those of cable-television providers, by bearing a disproportionate share of the overall cost of poles.

Moreover, application of the Federal rate for ILEC attachments would destroy the mutuality of interests in entering into reciprocity agreements. In other words, ILECs would be free to impose much higher costs on utilities for electrical attachments to ILEC facilities than utilities could charge for similar attachments to their facilities. This would create subsidization rather than competition, and would eliminate any incentive to enter truly negotiated agreements. In both respects it runs counter to the whole thrust of the Act and the intent of

Congress. Even members of the cable television industry recognize the benefit of such agreements (see TCI at 24, advocating cost-sharing arrangements).

**The Conduit Rate Proposed by the Commission Is Not
Appropriate for Electric Utility Ducts and Conduit**

There is a clear difference between those commenters who own and operate ducts and conduits (see, e.g., Union Electric at 11 & 25-26, Bell Atlantic/NYNEX at 12-13), and those who do not (see, e.g., Time Warner at 28, TCI at 16-17), and between those familiar only with telephone ducts (see, e.g., ALTS at 7, USTA at 21) and those familiar with the realities of electric utility ducts (see, e.g., Consolidated Edison Co. of New York, Inc. at 1-3 & 5-7). Viewing the comments from that perspective, it is clear that the proposed "half-duct" convention is completely inappropriate for electric utility ducts and conduits, because they are completely different from those of telephone companies, as we mentioned in our initial comments.

Any calculation of a just and reasonable conduit rate must be based on a complete conduit system, including ducts, conduit, cement or other encasement materials, vaults, "hand-holes," manholes and other related facilities and equipment that allows for deployment of, access to, and maintenance of underground cable facilities. Further, as the Utility Group notes (at 83), utilities cannot readily determine the number of feet of conduit or the number of ducts deployed or available in their system. For these reasons, neither the general idea of imposing a formulaic

conduit rate, nor the Commission's specific proposal for a rate formula are appropriate.

Therefore, the Commission should always defer to negotiated duct and conduit "attachment" rate agreements. Moreover, the Commission should adopt a forward-looking cost model for determining conduit rates when the parties are unable to negotiate an agreement (see SBC at 23). The use of forward looking costs for conduits is consistent with the FCC's proposed approach for valuing conduits (and poles) for purposes of determining universal service contribution requirements.³ Moreover, the adoption of forward looking costs for conduit systems is appropriate as it recognizes that electrical conduit is a unique resource that cannot readily be duplicated.

In addition, electric conduits have specific safety and reliability considerations that warrant special caution by the FCC in its application of the access requirements, just as much as in the development of those requirements. Ohio Edison points out (at 37) that electric vaults and manholes are crowded, confined quarters containing extensive electric equipment and circuits - much of it high voltage - which can pose grave potential dangers to untrained communications workers. Not only are important safety considerations involved, but the presence of non-utility personnel in electric vaults and manholes - even when properly trained - requires special procedures and precautions

3 *Further Notice of Proposed Rulemaking, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket No. 96-45, released July 18, 1997, para. 104.

that translate directly into additional costs borne by the utility and its customers.

All commenters familiar with electric utility facilities concurred in noting the practical impossibility of electric cables and telephone cables sharing the same duct. Empty utility reserve ducts are necessary for the rapid restoration of power, the existence of telecommunications cable within these ducts would preclude their use even for such emergency electrical service. As Ohio Edison points out (at 36), pulling electric cable through a duct in order to remedy an electrical cable failure would destroy the (far smaller) communications cable.⁴ Further, in older, smaller duct systems, it can take three spare ducts to have reserves for one electric circuit because only one conductor will fit in a duct and there are three conductors to a circuit (see EC at 64). In addition, utilities require significant separation between occupied electrical ducts and spare ducts for cooling purposes - in order to maintain conductor ampacity (see EC at 63).

Finally, all owners of ducts and conduits agree that some space must be reserved for maintenance and future growth (see, e.g., ALTS at 21), and that there are severe impediments to placing two cables of any kind in the same duct (see, e.g., SBC at 27-28,⁵ Union Electric at 9-10). The major difference between

4 Electric cable pulled through a duct is ordinarily on the order of several inches in diameter, weighing up to 20 pounds per foot (id.).

5 SBC also takes the position (at 32) that duct space dedicated to municipal or governmental use - usually as a condition of licensing -

telephone duct owners and utility owners is on how much space to reserve (see, e.g., EC at 63). This one example illustrates the different uses for and restrictions on telephone duct as compared to utility duct, and how a rate designed to recover distribution pole costs is completely inappropriate for electric utility ducts and conduits.

POLE RATES

Individual Utilities Should Be Free to Demonstrate Their Own Costs, Such as Average Pole Height

As with most of the issues addressed in this proceeding, the breadth of comments on the matter of pole height demonstrates the futility of attempting to impose a single rate formula on the multiplicity of circumstances within which utilities must accommodate requests for pole attachments. Even the Ameritech Operating Companies agree ("Ameritech" at 3) with our suggestion that individual utilities should be free to develop rates based upon their own individual circumstances.

Several commenters expressed their opinion that the average height of poles has not changed. (See Ameritech at 3, Time Warner Cable ["Time Warner"] at 10-11, Sprint at 3, SBC at 34, MCI at 3.) However, this is simply an uninformed opinion. In particular, Time Warner (at 10-11 & n. 24) relies on data at least twelve

should not be considered useable. We agree, for reasons similar to those stated by SBC. Such reserved space is not useable – is, in fact, part of the common cost which should be shared by all users of the facility (whether ducts, conduits, or even poles).

years old. It is clear that more recent data would reflect that a change is warranted (see Time Warner at 10-11, National Cable Television Assoc. ["NCTA"] at 10.) We simply suggest that the Commission correctly begins to address the matter at this time, and that the Commission permit utilities which desire to calculate rates based on their own company mix of pole heights to do so.

Several commenters also argued that poles of less than 30 feet are used or usable, more or less extensively, for telecommunications purposes. (See Ameritech at 4, Time Warner at 10-11 & 17-18, Bell Atlantic Telephone Companies & NYNEX Telephone Companies ["Bell Atlantic/NYNEX"] at 10, GTE at 13, USTA at 27-28, US West at 4, MCI at 13-14.) That may be the case for LECs, but it is irrelevant to our argument that poles under 30 feet tall should be eliminated from electric utility pole attachment rate calculations, if a utility wishes to calculate its rates in that manner. **Electric** utilities do not generally use such poles – at the very least, they do not use them in circumstances where telecommunications providers can attach to them. What use is made of 30-foot telecommunications poles by their telecommunications company owners (or other telecommunications providers) is not at all relevant to the development of rates applicable to pole attachments to electric utility facilities.

This argument is repeated, with even less relevance, by commenters who argue that increases in pole height which result from utility needs should not be reflected in attachment rates.

(See NCTA at 10, USTA at 25, TCI at 12-13, MCI at 4.) However, the reason for increasing pole height is not nearly as relevant as the fact of that increase. These commenters put forth the insupportable argument that attaching entities should bear no share of the actual cost of facilities from which they derive a significant benefit – a benefit which has real costs, as well as a discernible market value.

Such an argument is identical to the overwhelmingly rejected argument of taxpayers who claim that they should not pay for, for example, garbage collection if they voluntarily and extensively recycle. The adequate and sufficient response is that all who receive a portion of a common benefit must bear a **full** share of the costs of providing that benefit. If overall pole costs increase due to increased height, all who occupy poles must pay for that increase.

**Useable Space Benefits All and Must be Assessed to
Attaching Entities, Even If Recalculated**

If a formula is used instead of negotiated rates, the amount of space traditionally viewed as "useable" must be reduced. ALTS argues (at 5) that it is counterintuitive that poles would increase in height while useable space would decrease. Their argument reflects a fundamental lack of understanding. The original determination of useable space was a fiction constructed to assist the fledgling cable television industry. It was never an accurate reflection of reality. A revision to correct that

inaccuracy would of necessity have effects independent of the issue of pole height.

Time Warner (at 12-13) and Bell Atlantic/NYNEX (at 12) both complain that utilities have overstated the ground clearance required by the NESC. Their complaints are misguided. There is no dispute that the NESC requires a minimum clearance, for communications cables, of 15.5 feet (1997 NESC Table 232-1). However, that is the clearance at *midspan*. It also presumes that all required separation *between* lines has been maintained (see 1997 NESC App. A at 228, & App. A, Fig. A4, at 232).

In order to obtain that minimum clearance, attachments can be no lower than approximately 19.8 feet (see UG at 50). Further, that represents an average based on different separations between poles (id. at n. 117). In addition, some states impose substantial requirements for additional midspan clearance (see Ohio Edison at 22; see also Union Electric at 20).

Further, whatever amount the Commission determines is appropriate to reflect useable space, it must be recognized that said amount is based on a presumed average pole height. If and as the Commission adjusts the presumed average pole height, so must it also adjust the presumed useable space.

Finally, TCI argues (at 14) that the assessment of nonusable space to cable television operators violates the Act. That is simply incorrect. Section 224(d) does not prohibit the assessment of useable space to cable television operators, any more than does Section 224(e). They merely declare that useable space *must* be assessed to telecommunications operators under the final rate.

As the Commission already recognized by calling for a review and revision of the old attachment rate, it is now appropriate to consider all relevant factors in developing a regulatory rate (see UG at 27-28). One of these factors, as we stressed in our initial comments, is that all who benefit from utility facilities must pay all of the costs associated with that benefit. This means that useable space must be assessed to all attaching entities, because it provides benefits to all attachments.

**Safety Space Benefits All and Must be Assessed to
Attaching Entities, Even If Recalculated**

The 40-inch safety space is designed to protect the employees of communications companies from coming into physical contact with the potentially lethal voltage carried by electric lines (see UG at 51). The NESC requires such separation because of the presence of *communications* facilities on utility poles, not the other way around (id.). Thus, the 40 inch safety space should be allocated in whole, or in great measure, to attaching entities - in particular, to telecommunications providers - because it is directly attributable to the existence of telecommunications and cable-television attachments to electric utility facilities.

As with so many other issues, those who have no great ownership interest in distribution poles seek to avoid full responsibility for the costs associated with the very equipment they rely on to offer their service. In particular, they seek to rest on the Commission's past determinations implementing a

completely different statute, which was intended to achieve goals completely different from those of the Act. (See Time Warner at 15, AT&T at 18, NCTA at 13-14, MCI at 12.) Such arguments miss the mark entirely. The lure of this attempt to avoid paying a fair share is so strong that it even attracts some pole-owning adherents (see Bell Atlantic/NYNEX at 9; see also USTA at 23).

The referenced Commission determinations were reached in the context of implementing a statute with the explicit, and limited, purpose of facilitating the *initial* growth of a brand new industry – cable television. The goal of that statute has been achieved (see EC at 9 & 33-34). The Commission has now, pursuant to the Act, initiated a fresh look at the underlying assumptions of pole attachment rate regulation, to ensure that such regulation meets the goals to be achieved by the authority Congress has only recently granted the Commission (see UG at 27-28). Reference to outdated reasoning does nothing to further that review process, or to further the overall goals Congress set for the Commission.

The most outrageous of the arguments raised against paying a full share of the costs of safety space is that there would be no need for any safety space were electric utilities not on the poles, particularly since it is only utilities which must comply with the NESC. (See AT&T at 18, NCTA at 13-14, Bell Atlantic/NYNEX at 9, US West at 5, USTA at 23.) As amply demonstrated by the utility commenters, this argument is completely false. Further, it completely mischaracterizes the nature of the NESC.

This argument is akin to an airline passenger complaining that their ticket price should not include the cost of seat belts - or that they should be allowed to throw out the flotation cushions in order to bring more carry-on luggage - on the grounds that such safety equipment was necessitated only by the airline's hazardous activity of flying. In point of fact, *but for* utilities and their "hazardous" lines, there would be no poles for any attaching entities to demand the use of (see EC at 34). In fact, absent those attachments, electric utility poles could and would be shorter - there would certainly be no need for an extra 40 inches of "safety space" (see EC at 35, Union Electric at 21-23).

Moreover, the NESC applies to every entity with facilities on a pole, not just to utilities (see UG at 51-52, Ohio Edison at 20-21). USTA makes the baseless accusation (at 23) that utilities "push the envelope" of safety in placing luminaries or utility equipment within safety space. On the contrary, electric utilities use safety space **only** as specifically permitted by the NESC (see id., Union Electric at 21-23). In fact, moreover, attaching entities themselves make similar use of safety space (see Union Electric and Ohio Edison at 18-19).

Finally, NCTA states (at 12, n. 35) that safety space may be reduced to 30 inches. They claim to have found a variety of exceptions to the 40-inch requirement in the NESC. This interpretation of the NESC displays the dangerous lack of understanding of the NESC's intent and application common in the cable television industry.

The various "exceptions" that NCTA claims to have discovered in the NESC do **not** operate in the way they presume. In fact,

* NESC Rule 235(C)(1), Exception 3, allows the mid-span clearances between electric and communications service drops - the span attached to a building - to be reduced to 12 inches. This exception does not allow any reduction of clearances mid-span along the line of poles (see below), or at the poles.

* NESC Rule 235(C)(2)(b)(1)(a) requires the mid-span clearance between electric secondary and communications cables to be no less than 75% of the space at the pole actually required under individual circumstances. The NESC references **minimums** of 30 and 40 inches. This is not an "exception" to the 40-inch requirement. Rather, this requirement can only increase - never decrease - the required 40-inch separation at the pole.

* NESC Rule 235(C)(2)(b)(3) imposes an **additional** clearance requirement on open supply conductors between 750 Volts and 50 kilovolts (generally, distribution primary): the open supply conductor (at 60 degrees Fahrenheit, **no** wind, and unloaded) must be above a straight line joining the support points of the highest communications cable at all locations in the span. This requirement may increase - **not** reduce - the 40-inch separation required at the pole.⁶

EEI and UTC believe that logic dictates that cable and telecommunications companies - as the cost causers - are

6 We wish to thank New Electric System for their invaluable assistance with these points.